IN THE SUPREME COURT OF MISSOURI

ROBERT KAPLAN, et al.,	)	
	)	
Plaintiffs/Respondents,	)	
	)	
vs.	)	Appeal No. SC87390
	)	
U.S. BANK, N.A.,	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM ST. CHARLES COUNTY CIRCUIT COURT
THE HONORABLE RONALD R. McKENZIE, JUDGE

SUBSTITUTE REPLY BRIEF FOR APPELLANT U.S. BANK, N.A.

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INTRODUCTION

The Court of Appeals said what it meant in *Kaplan I* not once, but twice. Plaintiffs' arguments about "waiver" and the Court's "authority" are simply post-hoc creations to justify a transfer application. *Kaplan I* "clearly required" a retrial on "the issue" of punitive damages, both liability and amount. *Kaplan II*, 2005 WL 3041002 at *4. Plaintiffs cannot use this appeal to collaterally attack that result. And Plaintiffs can hardly say the Court of Appeals has no authority to interpret its own decision. Plaintiffs also present no basis for this Court's review regarding prejudgment interest, the only other subject addressed in their transfer application. Plaintiffs have set forth no ground for transfer satisfying Rule 83.05.

If this Court retains the case, it should reverse. The trial court's misapprehension of *Kaplan I* infected the entire trial, beginning to end. The verdict otherwise violates the limits imposed by Missouri law and the Federal Constitution. And the unjustifiable $5M award was increased further by $3.2M in prejudgment interest wholly unauthorized under Section 408.040.2. The judgment cannot stand.

POINTS RELIED ON

I. INSTRUCTIONS 2 AND 7 CONTRAVENED THE *KAPLAN I* MANDATE AND SKEWED THE DETERMINATION ON AMOUNT.

Kaplan v. U.S. Bank, N.A., 166 S.W.3d 60 (Mo.App. 2003)

Kaplan v. U.S. Bank, N.A., 2005 WL 3041002 (Mo.App.Nov. 15, 2005)

Edmison v. Clarke, 61 S.W.3d (Mo.App. 2001)

II. THE AWARD IS EXCESSIVE UNDER MISSOURI LAW.

Alcorn v. Union Pac. RR. Co., 50 S.W.3d 226 (Mo.banc 2001)

Werremeyer v. K.C. Auto Salvage Co., 134 S.W.3d 633 (Mo.banc 2004)

III. THE AWARD VIOLATES DUE PROCESS.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)

IV. PLAINTIFFS DID NOT SATISFY SECTION 408.040.2 AND THEIR MOTION FOR PREJUDGMENT INTEREST WAS UNTIMELY.

Mo. Rev. Stat. §408.040.2

Brown v. Donham, 900 S.W.2d 630 (Mo.banc 1995)

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V. WERREMEYER SHOULD NOT BE APPLIED RETROACTIVELY.

Sumners v. Sumners, 701 S.W.2d 720 (Mo.banc 1985)

ARGUMENT

I. INSTRUCTIONS 2 AND 7 CONTRAVENED THE *KAPLAN I* MANDATE AND SKEWED THE DETERMINATION ON AMOUNT.

Plaintiffs ask this Court to either tell the Court of Appeals it doesn't know what it did in *Kaplan I* or undo the holding in *Kaplan I* itself. There is no basis to do either.

A. *Kaplan I* Ordered A New Trial On Liability And Amount.

There can be no question about what the Court did in *Kaplan I*. Indeed, it made a special point of explaining the "Disposition and Instructions on Remand." *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 77 (Mo.App. 2003)("*Kaplan I*"). The Court reversed on Plaintiffs' trespass claim based on vicarious liability. As a result, Plaintiffs could not have punitive damages against the Bank based on that count. *Id.* at 77. Because the Court could not determine from the verdict whether punitive damages were based on the impermissible trespass theory, it reversed and remanded for new trial. *Id.* Having concluded that Plaintiffs made a submissible case for punitive damages on the direct negligence count, the Court directed "the trial court. . .at the new trial to submit the issue of punitive damages against the Bank on its own negligence." *Id. See also* L.F.278 (Mandate). As now reaffirmed, the remand included both liability and amount. *Kaplan v. U.S. Bank, N.A.*, 2005 WL 3041002 *4-5 (Mo.App.Nov.15, 2005)("*Kaplan II*").

Plaintiffs' attempt to reinterpret *Kaplan I* is based on a single line plucked out of context, i.e., the Court's statement that the Bank's constitutional excessiveness argument was moot in light of remand "as to the amount of such damages." Resp.Br.72-74. The Court observed only that it need not decide the constitutional issue because amount

would be retried as part of "the issue" of punitive damages, as "*further explained* at the end of [its] opinion." *Kaplan I,* 166 S.W.3d at 75.

The Court of Appeals knows how to order a new trial on amount only if that is what it means to do. *See, e.g., Lane v. Cape Mut. Ins. Co*., 674 S.W.2d 644, 645 (Mo.App. 1984). Plaintiffs' interpretation of the remand has been rejected by the very Court that rendered it. *Kaplan II,* 2005 WL 3041002 at *4-5.

B. The Trial Court Disregarded The *Kaplan I* Mandate.

For all their efforts to obscure the salient issue with meritless arguments about waiver (Resp.Br.66-75), Plaintiffs cannot deny two things: the trial court departed from the appellate court's mandate, and Plaintiffs provoked that departure.

The *Kaplan I* determination on submissibility was not, as Plaintiffs argued on retrial, a "finding" of liability. 1 Tr.82, 85. Submissibility is a *legal* determination, made by the Court reviewing the record in the light most favorable to plaintiff. *Kaplan I*, 166 S.W.3d at 73. It is not a *factual* determination made by a jury. It was Plaintiffs' argument that submissibility and liability are "one [and] the same" that convinced the trial court to instruct that the Bank's liability had already been decided. 1 Tr.82, 85.[1] This position, and the trial court's concurrence, was fundamentally wrong. "Submit[ting]

[1] Indeed, Instruction No. 2 fictionalized a prior jury's finding that the Bank's conduct was "equivalent of intentional wrongdoing"—a submissibility standard nowhere found in MAI 10.02. L.F.1155. Plaintiffs cannot defend the instructions on the basis garnered at trial and their rationalizations on appeal should be rejected for this reason as well.

the issue of punitive damages" meant both liability and amount. *See, e.g.*, *Burnett v. Griffith*, 769 S.W.2d 780, 791 (Mo.banc 1989). Awarding punitive damages is a three-step process. The first step—submissibility—is a question for the court. *See, e.g.*, *McGuire v. Tarmac Envtl. Co.*, 293 F.3d 437, 441-42 (8th Cir. 2002). The second and third steps—liability and amount—are for the jury. *See Kaplan II*, 2005 WL 3041002 at *4; *see also* Mo. Rev. Stat. §510.263. The defect in the first jury's verdict applied equally to both components. Just as the Court could not determine what *amount* was based on the impermissible theory, it could not determine whether *liability* was based on that theory. Accordingly, the Court ordered a new trial on both liability and amount based on the Bank's negligence alone. The trial court, however, took the liability question from the second jury in exchange for a liability presumption—based on the prior verdict *reversed* by the Court of Appeals. The punitive damages verdict of the first jury could no more support liability in the second trial than it could in the first. Were it otherwise, there would have been no remand for new trial at all.[2] For all their attempts to get around it, Plaintiffs do not actually dispute that the appellate court ordered one thing and the trial court did another.

[2] Plaintiffs argued only for erroneous adherence to the reversed liability component to get a second shot at an even larger amount. Plaintiffs sought some $19M in punitive damages at the first trial; they sought $50M at the second. *See* L.F.1235.

C. Plaintiffs' "Waiver" Arguments Are Meritless.

Plaintiffs can neither re-interpret the *Kaplan I* remand nor disavow the trial court's failure to follow it. The only other option is to change *Kaplan I* itself and validate the trial court's disregard retroactively. Plaintiffs propose no basis for that result.

All of Plaintiffs' arguments pertain to what they believe the Court of Appeals "should" have done, not what it actually did do. And all of Plaintiffs' arguments about "waiver" apply, if at all, to an appeal *sub justice*, not an appeal once removed. Plaintiffs say that because the Bank did not appeal on weight of the evidence, a negligence finding became "fixed" via Rule 84.13(a) and so the remand must have been on amount alone. *See* Resp.Br.72. If Plaintiffs are right, the Court would have affirmed. It did not.

Plaintiffs have no response to the impermissibility of a collateral challenge to *Kaplan I*, a decision that has been final since December, 2003. App.Br.38. Plaintiffs also ignore their change in position. Below, they said the Court of Appeals was not *obligated* to address the "liability issue." Now, they say it had no *authority* to do so. *Compare* Resp.E.D.Br.60 with Resp.Subst.Br.66-74. Plaintiffs cannot reinvent their position on transfer to this Court. Rule 83.08(b); *Linzenni v. Hoffman*, 937 S.W.2d 723, 726-27 (Mo.banc 1997). In any event, Plaintiffs' "authority" argument is just wrong.

Simply put, Plaintiffs misapply Rule 84.13(a). The premise of Plaintiffs' argument is that an appellate court cannot reverse based on a preserved error if there was another, separate, error that was not asserted. There is no authority for that proposition. In *Kaplan I*, the Court reversed the punitive damages award as a function of its reversal on the vicarious liability trespass claim. 166 S.W.3d at 77; App.Br.39-40. Another,

weight of the evidence challenge was not required for the Court to reverse on that basis. Plaintiffs have no response. Rule 84.14 permits, and the Court did, make its disposition as justice required. *Kaplan I*, 166 S.W.3d at 77.

Plaintiffs contend that had the Bank challenged weight of the evidence, the Court "could have" addressed it, and "would have" found in Plaintiffs' favor, leaving only the question of "how *much* of the punitive damages award related to [the Bank's] negligence." Resp.Br.73.[3] This argument presupposes that a liability finding based on negligence was actually made, which *cannot* be presumed from the first verdict. *See* App.Br.37(citing cases). The first jury's award may have been based entirely on vicarious liability for Southern's trespass. Any suggestion that one basis is as good as another (Resp.Br.74) throws out the difference in standards applicable to a trespass (MAI 10.01) versus a negligence (MAI 10.02) claim, and utterly ignores *Kaplan I*'s holding.

Plaintiffs' argument about the verdict form is unavailing for the reasons addressed in the Bank's opening brief. App.Br.40. Again, the Court did not reverse based on asserted error in the verdict form, but on the impermissibility of imposing punitive damages based on vicarious liability. Plaintiffs otherwise confuse incipient error with an issue arising as the result of a holding on appeal. Plaintiffs would hold parties to a lawsuit responsible for objecting *in anticipation* of the ultimate result. They cite no

[3] This is not what Plaintiffs said at trial. Plaintiffs obtained instructions for an entirely new amount of punitive damages, not some comparative assessment as to how *much* of the original $7M punitive damages award was attributed to the Bank's negligence.

authority for this proposition either. And if there is "fault" to be laid, it is not one-sided as Plaintiffs suggest. Resp.Br.75. Plaintiffs had as much opportunity and incentive as the Bank to request separately packaged verdict forms in order to preserve their verdict.

Finally, Plaintiffs also misapply the law of the case doctrine. Resp.Br.66-67, 72. Plaintiffs cite *Czapla*, 94 S.W.3d 426, for the proposition that "a former adjudication is conclusive not only as to all questions raised directly and passed upon, but also as to matters which arise prior to the first appeal and which might have been raised thereon but were not." *Id.* at 428. The Bank did not at the second trial assert error that arose prior to *Kaplan I*; it asserted error arising from the trial court's departure from *Kaplan I*'s mandate. *See Kaplan II*, 2005 WL 3041002 at *3 n.5.[4]

As pertinent to this appeal, the law of the case doctrine "governs successive appeals and applies appellate decisions to later proceedings in that case." *Kaplan II*, 2005 WL 3041002 at *3; *Miller v. Missouri Dep't of Transp.*, 97 S.W.3d 478, 481 (Mo.App. 2002). This doctrine is a "principle of ordered justice" and finality. *See Hankins v. Hankins*, 864 S.W.2d 351, 353 (Mo.App. 1993); *Davis v. J.C. Nichols Co.*, 761 S.W.2d 735, 738 (Mo.App.1988). Plainly stated, a trial court cannot overrule the appellate court. *Miller*, 97 S.W.3d at 481; *Hankins* 864 S.W.2d at 353. That is exactly

[4] In *Trout*, 780 F. Supp. 1396, the defendant reversed a position it had affirmatively taken throughout the proceedings and on which rulings already had been entered. *Id.* at 1425. That is not what happened here.

what the trial court did. *See Kaplan II*, 2005 WL 3041002 at *5; *Edmison v. Clarke*, 61 S.W.3d 302, 310 (Mo.App. 2001); *Boillot v. Conyer*, 887 S.W.2d 761, 763 (Mo.App. 1994). If Plaintiffs were dissatisfied with *Kaplan I*'s disposition, they might then have sought reconsideration under procedures including Rule 84.17. At this juncture, any request to reach back into *Kaplan I* and say it was "unauthorized" is unprecedented and abuses accepted precepts of orderly administration, finality, and law of the case.

D. The Erroneous Instructions Led To An Excessive Verdict.

The trial court's fundamental misconstruction of *Kaplan I* also skewed the arguments and presentation of evidence, preventing the Bank from receiving a fair determination of the *amount* of punitive damages.[5] App.Br.41-44.

Plaintiffs incorrectly argue that the Bank did not comply with Rule 84.04(d) in presenting this basis for reversal. Resp.Br.78-80. Point I included each of the required elements. It identified the trial court action, *i.e.*, the trial court's decision to give Instructions 2 and 7; it stated the legal reason for the claim of reversible error, *i.e.*, the instructions contravened the *Kaplan I* opinion and mandate; and explained "in summary

[5] Plaintiffs' suggestion that the second jury's option to award zero renders the instructional error harmless is untenable. Resp.Br.77. The jury's first and primary job is to decide if a party's conduct rises to a level warranting punishment, and only then to assess an amount. The trial removed the first issue from consideration, requiring the jury to *presuppose* that the Bank *should be* punished for conduct *already found* equivalent to intentional wrongdoing and recklessly indifferent. L.F.1155.

fashion" why the erroneous instructions require reversal, *i.e.*, because they deprived the Bank of a fair determination on amount. Rule 84.04(d)(1)(C). Part I.D of the Bank's brief explains how the instructions skewed that determination. The Bank does not argue abuse of discretion in individual evidentiary rulings, but a misconstruction of *Kaplan I* that led to wholesale disregard of the Bank's right to present mitigating evidence.

Plaintiffs have no meaningful response to that argument. Plaintiffs do not deny, or attempt to defend, their use of the instructions to argue that the Bank's attempt to litigate liability *itself* warranted punitive damages. App.Br.41-44. Plaintiffs' efforts to defend the exclusion of mitigating evidence are wholly unpersuasive. Plaintiffs' primary contention—that most of the excluded evidence was actually admitted—is incorrect. Resp.Br.79.[6] Plaintiffs' other arguments are equally meritless. For example, the proffered testimony from Vadja about Southern's responsibilities under the work plan

[6] The court barred Werre from explaining how he and Winter agreed to place the concrete in Plaintiffs' ditch without the Bank's knowledge. App.Br.43. Contrary to Plaintiffs' assertion (Resp.Br.79), the court "[s]ustained" the objection, 8 Tr.11, and no remedial instruction was required, *see* L.F.1153. Likewise, the court prohibited Myers from testifying about her belief that Southern would take responsibility for removing the concrete. 7 Tr.61-62. Plaintiffs do not dispute that the Bank was prohibited from asking a DNR representative whether anyone else at the Bank knew the concrete did not go to landfill. App.Br.43.

was extremely relevant because Southern's contractual responsibility for disposing of the concrete mitigates the Bank's responsibility. The trial court's misconstruction of *Kaplan I* tainted the entire trial.[7] The enormous verdict produced by that flawed process cannot stand.

II. THE AWARD IS EXCESSIVE UNDER MISSOURI LAW.

A. Plaintiffs Mischaracterize The Bank's Conduct.

Despite Plaintiffs' zealous attempts to re-characterize the record, several critical facts are clear. First, Southern contractually promised to "properly dispose[] of" the concrete. Def.Ex.M616, App.B. Plaintiffs contend that Myers had not decided where to take the concrete as of May 1996 (Resp.Br.84), but a June 12, 1996, change order made clear that Southern was to "dispose of contaminated material" containing PCBs at one of two specified landfills. Pl.Ex.171.[8] The Bank expected Southern to comply with its contractual duty. 7 Tr.54, 88, 103.

Second, Southern agreed to "defend" and provide "indemnif[ication]" for "all suits, claims, and expenses" arising out of its work. Def.Ex.M616, p.4. When the Bank

[7] Under any circumstance, the Bank's mitigating evidence was relevant to the appropriate amount of punitive damages. App.Br.43 n.8. Plaintiffs offer no response.

[8] Plaintiffs say the Bank had not decided how to dispose of the waste concrete as of June 28, 1996. Resp.Br.84. But the AMI report Plaintiffs cite only covered remediation activities through June 1, 1996. Pl.Ex.177, p.1.

found out that Southern had placed the concrete in Plaintiffs' ditch, it believed Southern would remove it. 6 Tr.164, 173.

Third, Plaintiffs suffered only economic injury. *Kaplan* I, 166 S.W.3d at 72; L.F.128, 1155(¶6). Plaintiffs' speculation about hypothetical harms is wholly unsupported. *Infra*, pp.28-29.

Finally, the concrete posed no risk to health or safety. Plaintiffs stipulated that the concrete was nonhazardous under state and federal law. L.F.1127. No environmental law required that it be placed in a landfill. *Id.* Further, the undisputed evidence demonstrated that PCBs did not leach into the water, 8 Tr.71; Pl.Ex.227, pp.7-8, and there was no aquatic life in the ditch, 8 Tr.70. There was no danger that PCBs could "accumulate and become toxic as they move up the food chain." Resp.Br.17. There was no "harm . . . caused to any aquatic life," and no person was injured. 8 Tr.70.

B. The Punitive Damages Are Excessive.

1. No Malicious Conduct or Similar Occurrences.

Plaintiffs attempt to create the impression that the Bank's negligence was part of an intentional scheme designed to cause their injury. Resp.Br.82-90. But the Bank did not even know that the concrete had been placed on Plaintiffs' property until six months later. 6 Tr.164. Nor did the Bank "explicitly reject[]. . .landfill[ing] the waste." Resp.Br.83. To the contrary, the Bank assumed Southern would properly dispose of the concrete. *See* 5 Tr.113-14; 7 Tr.51, 88, 103; Def.Ex.M616, App.B; Pl.Ex.171. If the Bank failed to monitor Southern's conduct, its mistake was an isolated one.

Plaintiffs may not "rove through all of a defendant's conduct that might justify punishment, but that caused plaintiff[s] no injury." *Vaughn v. N. Am. Sys., Inc.*, 869 S.W.2d 757, 759 (Mo.banc 1994). Plaintiffs do just that, faulting the Bank for conduct that caused them no harm, including statements made to Missouri regulators and homeowners. Resp.Br.86-87. Not only were all the referenced statements true, they did not cause any harm to *Plaintiffs*. App.Br.60-61. Finally, Plaintiffs' reliance on litigation conduct is extraordinarily inappropriate. Resp.Br.87. The Bank presented truthful testimony and permissible legal defenses. App.Br.59-60. And "an aggressive defense at trial" cannot be a basis for punishment. *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 248 (Mo.banc 2001).

"[P]unitive damages may be reduced when . . . similar occurrences known to the defendant have been infrequent." *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 636 (Mo.banc 2004). *See also Alcorn*, 50 S.W.3d at 248. Plaintiffs cannot dispute that the Bank's conduct was not repeated. App.Br.46.

2. Others Contributed to Plaintiffs' Harm.

Unquestionably, the negligence of others contributed to Plaintiffs' harm. *See Werremeyer*, 134 S.W.3d at 636. Southern failed to comply with its contractual responsibilities by placing the concrete in the ditch. 9 Tr.25. Southern did so upon Werre's request and representation that the ditch was on Werre's property. 7 Tr.164-67. Werre believed that filling the ditch was permissible. 8 Tr.9-10, 12. The injury-producing event would not have occurred but for a mistake about who owned the ditch.

Plaintiffs' only response is that the Bank "caused Plaintiffs' injuries." Resp.Br.91. Meeting a base causation standard for negligence liability, however, does not justify $5M in punitive damages. *See Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Prods., Inc.*, 700 S.W.2d 426, 436 (Mo.banc 1985).

3. No Violation of Statute, Regulation, or Industry Standard.

The Bank did not knowingly violate a "statute, regulation, or clear industry standard" designed to prevent Plaintiffs' harm. *Lopez v. Three Rivers Elec. Coop.*, 26 S.W.3d 151, 160 (Mo.banc 2000). No state or federal environmental law required that the concrete be taken to a landfill. *See* L.F.1127. Contrary to Plaintiffs' contention (Resp.Br.92), the work plan was not a "clear industry standard" but an agreement between private parties about how the Lackland Road remediation would proceed. Ordinary contract obligations, without more, are not "clear industry standards." *See id.* at 161 (requiring "clear" and "specific" evidence to invoke an industry standard).

Plaintiffs say the Bank violated the Missouri Clean Water Law ("MCWL"). Resp.Br.92. There has been no such administrative or judicial determination. 8 Tr.74-75. When the DNR became concerned about the waste concrete, it sent violation notices to *Southern and the homeowners*, not the Bank. Pl.Exs.251, 253, 259. Neither jury was asked to decide whether the Bank violated the MCWL (L.F.125, 1155), and the Attorney General's filing of suit does not establish a violation, particularly where liability is contested. 2 Tr.103. Indeed, the Bank cannot be liable for a MCWL violation because it did not place the concrete in the ditch or direct Southern to do so, and cannot be

vicariously liable for Southern's conduct. Mo. Rev. Stat. §644.051.1(1); *Kaplan I*, 166 S.W.3d at 66-69.

Most significantly, any violation could not have been *knowing*. Southern's contractual obligation to properly dispose of the concrete led the Bank to believe that Southern had, in fact, done so. 7 Tr.51, 88, 103. And the Bank had no actual knowledge of Southern's mistake until *six months* after it occurred. 4 Tr.94; 6 Tr.164.

4. Additional Factors.

The additional factors Plaintiffs cite do not justify their verdict. Plaintiffs invoke the nature of their injury, but they mischaracterize it. Plaintiffs' injury was economic. Plaintiffs' contention that the Bank "created an environmental hazard" (Resp.Br.93) is patently false. *Supra*, p.18.

Plaintiffs also say that $5M is only a small percentage of the Bank's net worth. Resp.Br.94. Under Missouri law, net worth is not one of the central factors in assessing punitive damages. *See Werremeyer*, 134 S.W.3d at 636. As a matter of due process, net worth cannot validate an otherwise excessive award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003).[9]

[9] Plaintiffs' final contention (Resp.Br.94-95) that the Bank's conduct "reflects poorly on its character" merely repeats their argument that the Bank's conduct was malicious, which it was not.

C. The Bank's Conduct Is Not Sufficiently Egregious.

This Court has found conduct far worse than the Bank's insufficient to even *submit* punitive damages. *Alcorn*, 50 S.W.3d at 248-49; *Lopez*, 26 S.W.3d at 160-61. Plaintiffs counter that the defendants in those cases did not violate any state statutes or regulations. Resp.Br.89. But neither did the Bank. And the injuries in those cases were far more serious than economic.

Finally, the Legislature's recently codified view that punitive damages more than five times compensatory damages are excessive should be considered. *See* Mo. Rev. Stat. §510.265(2005). Plaintiffs completely ignore that legislative judgment, which cannot be squared with the 11-to-1 ratio in this case. In light of this and all the judicial factors, the $5M award plus interest is excessive.

D. The Bank's Excessiveness Challenge Is Properly Preserved.

Plaintiffs say the Bank waived its excessiveness argument by not citing one specific case upon which it now relies—*Werremeyer*. Resp.Br.81 n.16. The Bank properly preserved the excessiveness issue in its new trial motion. L.F.1187-88, 1218-19, 1309-10, 1343-44. *See also* Rule 78.07(a). The Bank presented legal authority for its argument, including cases identifying the three key factors for judging excessiveness—*Alcorn* and *Lopez.* L.F.1188, 1310. The Bank explained how each of these factors counseled against the award. L.F.1188(¶6), 1310(¶6). Plaintiffs' suggestion that the trial court did not have sufficient guidance to evaluate this argument is meritless.

III. THE AWARD VIOLATES DUE PROCESS.

A. Plaintiffs May Not Rely On Unrelated Conduct.

Plaintiffs readily admit that "the lion's share" of their evidence was conduct not directly related to the Bank's underlying negligence. Resp.Br.110. This flies in the face of *State Farm*'s "fundamental" holding that a defendant's acts, "independent from [those] upon which liability was premised, may not serve as the basis for punitive damages." 538 U.S. at 422. "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423. *See also Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 832-33 (8th Cir.2004).

Plaintiffs mischaracterize the issue as one of routine "evidentiary rulings." Resp.Br.120. The Bank does not argue abuse of discretion under the rules of evidence, but that certain evidence cannot be the basis for punishment as a matter of constitutional law. *See State Farm*, 538 U.S. at 422-24.

Plaintiffs cannot rely on statements to the homeowners or the DNR. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims." 538 U.S. at 423. "Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.* The Bank's litigation conduct also cannot justify punishment because it is not part of "the acts upon which liability was premised." *Id.* at 422. Were it otherwise, punitive damages would be warranted any time a defendant filed an answer or a dispositive motion. That position puts an unacceptable burden on the right to defend. Vigorous defense is lawful,

in no way related to the underlying tort, and not a permissible basis for punishment. *See Alcorn*, 50 S.W.3d at 248.[10]

Finally, the Bank cannot be punished for maintaining, or accurately describing, Gusdorf as the owner of the Lackland Road site. App.Br.60. That had nothing to do with placement of concrete on Plaintiffs' property. Plaintiffs have no response.

Plaintiffs' claim for punitive damages was largely based on conduct unrelated to Plaintiffs' injury. Plaintiffs continue to advance that conduct before this Court. *State Farm* commands that Plaintiffs *may not* "expand the scope of the case so that a defendant may be punished for any malfeasance" over an extended period of time. 538 U.S. at 424. The conduct on which Plaintiffs so extensively rely must be disregarded because is not the conduct for which the Bank was found liable.

B. The Bank's Conduct Was Not Sufficiently Reprehensible.

Under all five *State Farm* factors, the award in this case is excessive. Indeed, the Bank's conduct would not be reprehensible under these factors even if the irrelevant conduct Plaintiffs advance is considered.

[10] Contrary to Plaintiffs' suggestion, *TXO* does not sanction litigation conduct as a basis for punitive damages. There, the Court considered the defendant's litigation conduct only because *it was* the underlying conduct for which the defendant was found liable. 509 U.S. at 450. That is not the case here. *Cf. State Farm*, 538 U.S. at 421(lawful conduct cannot be the basis for punishment).

1. Only Economic Injury.

Plaintiffs' injury was economic. App.Br.52-53; *Kaplan I*, 166 S.W.3d at 72. The instructions in the first trial reflected that Plaintiffs' harm was the decreased value of their property, L.F.128, as did Instruction 2, which Plaintiffs proposed, L.F.1155(¶6). An award of $5M is too high a penalty for this purely economic harm. App.Br.52-53. Plaintiffs invoke hypothetical environmental harm. Resp.Br.98-102. But no such harm occurred. Plaintiffs disregard not only their stipulation that the concrete was nonhazardous, L.F.1127, but that lack of aquatic life in the ditch made accumulation of PCBs in the food chain impossible, 8 Tr.70.[11]

2. No Reckless Disregard for Health or Safety.

The Bank's failure to ensure that the concrete went to a landfill did not exhibit reckless disregard for health or safety. App.Br.53-54. The concrete contained only trace, nonhazardous amounts of PCBs (L.F.1127), no PCBs leached into the water (Pl.Ex.227, pp.7-8), there was no aquatic life in the ditch (8 Tr.70), and there was no injury to any person, *id.* The Bank did not act *recklessly*, for it believed that Southern would properly dispose of the concrete. 5 Tr.113-14; 7 Tr.51, 88, 103.

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[11] *Johansen*, 170 F.3d 1320, is inapposite. First, *Johansen* is of questionable validity because it approved a 100-to-1 ratio. According to *State Farm*, "few awards exceeding a single-digit ratio" can ever satisfy due process. 538 U.S. at 425. Second, the defendant in *Johansen* actually caused environmental harm to the plaintiffs. 170 F.3d at 1327.

Plaintiffs say the Bank's decision to remove the concrete from its own property demonstrates a health or safety risk. Resp.Br.102-103. But the Bank removed the concrete to improve the property's marketability. 6 Tr.82-83; *see also* Resp.Br.25. This is the same reason *Plaintiffs* removed the concrete, three years later, when Lowe's wanted to lease (and later buy) Plaintiffs' property. 9 Tr.78-79. If the concrete really posed the significant health/safety risk Plaintiffs claim, they would have removed it immediately—not waited until remediation was economically advantageous.

3. Plaintiffs Not Financially Vulnerable.

Unable to dispute their own financial stability, Plaintiffs point to nearby homeowners, whom they characterize as "financially vulnerable targets." Resp.Br.107-108. *State Farm*'s reference to "targets" necessarily means "plaintiffs," since punitive damages cannot be awarded based on conduct directed at third parties. *Supra*, p.23. Even if "target" has a broader meaning, the homeowners hardly meet it since they participated in the negligent conduct that harmed Plaintiffs. 7 Tr.164-67. And there is no evidence that the homeowners were financially vulnerable.

Plaintiffs also invoke hypothetical costs they might have incurred. Resp.Br.106-107. Additional harms have nothing to do with Plaintiffs' financial stability. And Plaintiffs' speculation about additional harms is unsupported. *Infra*, pp.28-29. Plaintiffs cannot deny that their ample financial resources weigh against their award.

4. No Recidivism.

The fourth reprehensibility factor—recidivism—is also entirely absent. App.Br.54. Plaintiffs have no response.

5. No Intentional Trickery, Malice, or Deceit.

Finally, deposit of the waste concrete in Plaintiffs' ditch did not result from malice, trickery, or deceit. App.Br.55. When the Bank learned—six months later—that the concrete was not taken to a landfill, the Bank relied on Southern's assurances that it would resolve the problem. 4 Tr.94; 6 Tr.164, 173.

Unable to show trickery, malice or deceit, Plaintiffs try to manufacture it. Resp.Br.109-111. Plaintiffs' suggestion that the Court of Appeals made a factual finding that the Bank's conduct was "the equivalent of intentional wrongdoing" is incorrect for the reasons already addressed, *supra* p.10. And such a finding—had it been made—is not equivalent to "trickery, malice, or deceit," which requires *actual* malicious intent. *See State Farm*, 538 U.S. at 419; *BMW of N. Am. v. Gore*, 517 U.S. 559, 576 (1996).

Plaintiffs claim that the Bank lied to "regulatory authorities, the Attorney General, and the trial court." Resp.Br.110-11. But the Bank's statements were true and, in any event, harm to third parties cannot justify punitive damages for Plaintiffs. App.Br.59-61. Plaintiffs also say the Bank "litigated issues it knew to be false." Resp.Br.110. The Bank's litigation conduct was entirely reasonable and is not a permissible basis for punishment. App.Br.58-60.

C. Excessive 11-to-1 Ratio.

Even in the most egregious cases, "an award of more than four times the amount of compensatory damages" approaches "the line of constitutional impropriety." *State Farm*, 538 U.S. at 425. Here, the substantial compensatory damages indicate that

punitive damages "equal to compensatory damages" are the constitutional limit. *Id.* Plaintiffs have no explanation why this holding of *State Farm* does not apply.

Contrary to Plaintiffs' contention (Resp.Br.116-17), the Bank correctly calculated the damages ratio. Plaintiffs were awarded $5M in punitive damages. The Bank's share of actual damages was $520,000.[12] Without considering prejudgment interest, the ratio is more than 9 to 1. Adding prejudgment interest to the punitive and compensatory awards, the ratio is 11 to 1.[13] Even Plaintiffs' proposed ratio—7.8 to 1—is well in excess of the 1-to-1 ratio deemed appropriate by the Supreme Court for cases like this one.

Plaintiffs' only other retort is that the ratio is permissible if speculative, unrealized harms are added to actual damages. Resp.Br.114-16. But potential harm is relevant *only* when the defendant had a scheme to harm the plaintiff that did not come to fruition and, as a result, there is a significant disparity between the plaintiff's actual harm and the potential harm. *E.g.*, *Gore*, 517 U.S. at 581; *TXO*, 509 U.S. at 460-62. The Bank had no scheme to target Plaintiffs, and Plaintiffs' harm was fully realized. *See Kaplan I*,

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[12] Plaintiffs do not explain why the Bank's actual pro rata share of compensatory damages should not be used to calculate the ratio. App.Br.56 n.10.

[13] Punitive damages are not awarded to compensate, but "to punish [a] defendant's bad conduct." Interest on punishment begets more punishment. *See, e.g.*, *McEvoy Travel Bureau, Inc. v. Norton Co.*, 563 N.E.2d 188, 196 (Mass.1990). The cases on which Plaintiffs rely (Resp.Br.117) do not even involve punitive damages.

166 S.W.3d at 72, 77. Thus, excessiveness here is judged by "a comparison between the compensatory award and the punitive award." *Gore*, 517 U.S. at 581.[14]

Plaintiffs' speculation about potential harms also is contradicted by the record. Plaintiffs' assertion that they faced "potential loss" of millions in the value of their property (Resp.Br.115) is amazing considering their sale to Lowe's for $6.7M after spending less than $650,000 to remove the concrete. 9 Tr.119-20. Plaintiffs' suggestion that nearby homeowners could have sued them is nonsensical since the homeowners asked Southern to place the concrete in the ditch, and *Plaintiffs sued them* for doing so. 7 Tr.164-67; L.F.2, 37-57.

Plaintiffs have no support for their claims of unrealized additional harms, and no basis to quantify them. Plaintiffs are silent as to the ratio if those purported harms were considered. Plaintiffs' request that this Court sanction $5M based on a conclusory assertion of theoretical, unquantified harm blasts a loophole through *State Farm* big enough to eviscerate any comparative assessment at all.

Plaintiffs' disregard of *State Farm* is vividly illustrated by their repeated statements that an "infinite ratio" of punitive to actual damages would be permissible. *See* Resp.Br.114, 117-18. According to *State Farm*, "few awards exceeding a single-digit ratio between punitive and compensatory damages. . .will satisfy due process." 538

[14] Plaintiffs also attempt to justify the award based on uncompensated actual damages, such as litigation costs. Resp.Br.106, 116. *State Farm*, however, requires an assumption that compensatory damages made Plaintiffs whole. 538 U.S. at 419.

U.S. at 425. Plaintiffs cite to wholly dissimilar cases involving much more serious conduct or much smaller compensatory damages awards. Resp.Br.117-18. *State Farm* is controlling precedent. Plaintiffs treat it as advice they may choose to reject.

D. No Comparable Civil Or Criminal Penalties.

Missouri law has no statutory penalties for negligence. Even Missouri's penalties for trespass, an *intentional* tort for which *Kaplan I* ruled the Bank could not be liable, are far smaller than the massive award in this case. App.Br.58. Penalties for violation of the MCWL are not comparable. The Bank has not been, and cannot be, found liable for a MCWL violation. *Supra*, pp.20-21. The first jury found the Bank liable for negligence, not a statutory violation. L.F.125. And MCWL liability requires numerous elements the jury did not find, including that the Bank "place[d] or cause[d] or permit[ted] to be placed" a "water contaminant" in "waters of the state." Mo. Rev. Stat. §644.051.1(1). These additional elements mean that a MCWL penalty is not comparable. *Cf. State Farm*, 538 U.S. at 428 (criminal penalties not comparable because "higher standards of proof" required). Plaintiffs refer to the highest possible penalty of $10,000 per day. Resp.Br.118. State regulations, however, militate to the contrary. *See* 10 CSR 20-3.010 (lower penalty appropriate when no harm to animals or aquatic life, receiving water not a source of drinking water or an aquatic habitat, and violator did not control placement of contaminant in water). The "remote possibility" of a substantial penalty "does not automatically sustain a punitive damages award." *State Farm*, 538 U.S. at 428.

Under each component of the *State Farm* test, the award in this case is unconstitutionally excessive.

IV. PLAINTIFFS DID NOT SATISFY SECTION 408.040.2 AND THEIR MOTION FOR PREJUDGMENT INTEREST WAS UNTIMELY.

A. Plaintiffs Did Not Make A "Demand For Payment."

Section 408.040.2 requires an "offer of settlement" or a "demand for payment." Plaintiffs do not pretend that they made an "offer of settlement." Neither do Plaintiffs say they made a demand for *payment*. Rather, Plaintiffs say they made a demand for "*corrective action.*" Resp.Br.124-26. This is not what the statute requires. Plaintiffs may not expand the statute beyond its terms. This Court need go no further. App.Br.65.

Even if the word "payment" in Section 408.040.2 could be replaced with the words "corrective action," Plaintiffs made no "demand." Rather, they sent a notice of intent to sue. App.Br.64-65, 67. And Plaintiffs' purported "demand for corrective action" was compliance with federal environmental laws (Resp.Br.125-26) with which the Bank was *already in compliance*. App.Br.65. Plaintiffs have no response.

B. Plaintiffs Did Not Demand A Readily Ascertainable Amount.

A demand for payment must be "definite"—either "dollars and cents" or a "readily ascertainable" amount—because it is "analogous to an offer in contract." *Brown v. Donham*, 900 S.W.2d 630, 633 (Mo.banc 1995). Plaintiffs' notice did not request a dollar amount and no amount was readily ascertainable. Demands are not sufficiently definite where it is unclear what amount would satisfy the plaintiffs. *See* App.Br.66-67(citing *Id.* at 633).

Plaintiffs' notice did not specify their state-law claims or the sort of damages sought on those claims. L.F.1175-79. Plaintiffs say a demand may be quantified or

ascertained by use of commercially reasonable standards. Resp.Br.127.[15] This argument, however, is premised on the notion that Plaintiffs sought only a "clean-up of the creek." Resp.Br.128-29. That premise is a fabrication. *See* App.Br.67-70. Even now, Plaintiffs fault the Bank for not also providing an indemnity. Resp.Br.54, 103, 107, 115. And clearly, the $107,000 bid obtained by Southern to merely haul off the concrete was never presented as a "demand," or an amount that would suffice in "satisfaction" of any claim, expressly or as "implied from the circumstances." Resp.Br.129. The circumstances here demonstrate just the reverse. App.Br.68-69.[16] Finally, Plaintiffs' notice indicated that Plaintiffs sought actual "and punitive" damages. L.F.1178. Plaintiffs cannot explain how the Bank could possibly have ascertained *that punitive* amount. *See* App.Br.69.[17]

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[15] Plaintiffs rely solely on cases under Section *408.020*, the statute applicable to contract, not tort, cases. *Id.* Demands are more "readily ascertainable" in contract than in tort cases. *E.g.*, *Brown*, 900 S.W.2d at 633. Moreover, Sections 408.020 and 408.040.2 are based on different principles. Under Section 408.020, interest is automatically due on a debt arising from a contract or account once the debt is liquidated. Under Section 408.040.2, interest is only allowed when plaintiff demands an amount, defendant declines to pay it, and plaintiffs recovers more than the amount demanded.

[16] These circumstances are appropriately considered. Plaintiffs' citations to *Lester*, 850 S.W.2d 858, and *McCormack*, 159 S.W.3d 387, are misplaced for the reasons already discussed in the Bank's opening brief. App.Br.69 n.17.

[17] Plaintiffs' only response is that they would not have recovered punitive damages if the

C. Plaintiffs' Motion Was Untimely.

Under Rule 75.01, a plaintiff who has not previously requested prejudgment must move for it within thirty days of the judgment. Plaintiffs say the Bank cited no cases supporting that reading of the rule (Resp.Br.132) but ignore the Bank's citation to *AGC Ins. Fund v. Jetco Heating & Air Conditioning, Inc.*, 815 S.W.2d 141 (Mo.App. 1991). App.Br.70. That case clearly holds that a motion to amend the judgment to add prejudgment interest must be made within thirty days of the judgment. *Id.* at 142. A motion must be made before the trial court loses jurisdiction. If a timely request were not required, neither the courts nor the parties could rely on the finality of the judgment.

Plaintiffs' reliance on *McCormack* is misplaced. The issue there was not whether plaintiffs made a timely *motion* for prejudgment interest, but whether their original *settlement offer* survived to the second trial. 159 S.W.3d at 401-04. Further, the *McCormack* plaintiffs made a timely request for prejudgment interest as soon as the judgment exceeded their settlement offer. *Id.* at 401. Here, Plaintiffs did not.

Plaintiffs say they did not obtain a verdict that exceeded their "demand" until the conclusion of the second trial. Resp.Br.134. That argument equates the first jury verdict of $650,000 with a "demand" made in August 1997. A demand must be measured at the time it is made. In arguing that their request for corrective action was quantifiable,

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Bank had cleaned up the ditch. Resp.Br.131-32. The relevant consideration is what Plaintiffs demanded and whether it was quantifiable, not what they ultimately could have recovered in a lawsuit.

Plaintiffs identify the amount as $107,000. Resp.Br.131. The verdict at the first trial exceeded that figure. L.F.179. Plaintiffs should have sought prejudgment interest at that time. App.Br.70-71.

Plaintiffs also fail to explain why they did not seek prejudgment interest on the punitive damages awarded at the first trial. Plaintiffs should have done so if they believed themselves entitled to it. They did not and thus, the Bank was entitled to assume that prejudgment interest was not at issue when it decided whether to appeal the first verdict. Plaintiffs should not be permitted to belatedly obtain that interest.

V. *WERREMEYER* SHOULD NOT BE APPLIED RETROACTIVELY.

The *Werremeyer* rule allowing prejudgment interest on punitive damages should not be applied in this case because retroactive application would not advance the purposes behind the rule and the balance of harms favors only prospective application. App.Br.72-76. *Sumners v. Sumners*, 701 S.W.2d 720, 722-23 (Mo.banc 1985).

Plaintiffs respond that *Werremeyer* did not establish a new principle of law and the Bank had notice that it could be subject to prejudgment interest on punitive damages. Resp.Br.135-36. In announcing its holding in *Werremeyer*, this Court specifically stated that it "overruled" precedent to the contrary. 134 S.W.3d at 637. In *Call*, prejudgment interest was not challenged on the basis that it could not be awarded on punitive damages, and the Court did not address that issue. 925 S.W.2d at 853-54. The issue was not squarely addressed until *Werremeyer*. Retroactive application of *Werremeyer* would give Plaintiffs a $3M windfall and impose massive, unanticipated liability on the Bank. App.Br.75-76. It also would not further the purpose of encouraging settlement. The

Banks' decision not to settle occurred years before *Werremeyer* was decided. *Id.* at 74. Also, the Bank's lack of notice that it could face interest on punitive damages raises serious constitutional concern. *Id.* at 76.

CONCLUSION

For the foregoing reasons and those in the Bank's opening brief, this Court should reverse the punitive damages award and remand for a new trial, or remit the award to the amount of Plaintiffs' compensatory damages. In either event, this Court should vacate the award of prejudgment interest.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 84.06(c), this brief: 1) contains the information required by Rule 55.03; 2) complies with the limitations in Rule 84.06(b); and 3) contains 7,723 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Word 2000. The undersigned further certifies that the accompanying disk has been scanned and found virus free.

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CERTIFICATE OF SERVICE

I certify that one hard copy of this brief and one disk, as required by Rule 84.06(g), were served on each of the counsel identified below by the means identified below, on July 24, 2006.

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